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No. 94-1664

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STACEY C. KOON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a district court's downward departure from the prescribed range of the United States Sentencing Guidelines based upon factors not expressly prohibited as grounds for departure is to be reviewed under the de novo standard applied by the court below or under the deferential standard set forth in *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993), and other cases.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Stacey C. Koon, Laurence M. Powell, and the United States of America.

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No. 94-1664

In The
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October Term, 1995

Stacey C. Koon,
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v.

United States of America,
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On Writ of Certiorari to the
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BRIEF FOR PETITIONER

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-79a) is reported at 34 F.3d 1416. The court of appeals' order denying the petition for rehearing and suggestion for rehearing *en banc* (Pet. App. 80a-81a) and the opinions of the nine judges dissenting therefrom (Pet. App. 81a-93a) are reported at 45 F.3d 1303. The sentencing memorandum of the district court (Pet. App. 94a-138a) is reported at 833 F. Supp. 769.

JURISDICTION

The court of appeals' decision and judgment were filed on August 19, 1994. The petition for rehearing and suggestion for rehearing *en banc* was denied on January 12, 1995. The petition for writ of certiorari was timely filed on April 10, 1995. The petition was granted on September 27, 1995. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND SENTENCING GUIDELINES PROVISIONS INVOLVED

This case principally involves the following statutes and United States Sentencing Guidelines ("U.S.S.G."), the pertinent portions of which are reprinted in the Appendix to this brief: 18 U.S.C. § 242; 28 U.S.C. § 991; 18 U.S.C. § 3553; 18 U.S.C. § 3742; U.S.S.G. Ch. 1, Pt. A intro. comment. (excerpts); U.S.S.G. § 2A2.2; U.S.S.G. § 2H1.4; U.S.S.G. § 5K2.0, p.s.; U.S.S.G. § 5K2.10, p.s.[1]

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[1] All citations to the Sentencing Guidelines are taken from the Guidelines Manual dated November 1, 1992—the Guidelines Manual in effect on the date of Sergeant Koon's sentencing. *See generally* U.S.S.G. § 1B1.11(a) ("The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.").

STATEMENT OF THE CASE

A. Statement Of The Facts[2]

1. Rodney King's Arrest

On the evening of March 2, 1991, Rodney Glen King met two male friends in a suburb of Los Angeles. Pet. App. 96a-97a. For several hours, Mr. King and his friends drank malt liquor in his wife's parked Hyundai automobile, after which they then decided to go for a ride, with Mr. King driving. *Id.* 97a.

Mr. King was "intoxicated while driving."[3] *Id.* 121a; *see also id.* 2a, 97a. He was proceeding along the 210 Freeway towards the San Fernando Valley, *id.* 2a, 97a, when California Highway Patrol ("CHP") Officers Melanie Singer and Tim Singer observed Mr. King's speeding vehicle and commenced in pursuit with red lights flashing and siren activated. *Id.* Officer Melanie Singer estimated that Mr. King's vehicle was traveling in excess of 100 m.p.h. *Id.*

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[2] The facts stated below are based on the findings of fact made by the district court in its sentencing memorandum. The district court's factual findings were affirmed by the court below and were not challenged on appeal by the United States.

[3] "[I]t is certain that Mr. King consumed more than 80 ounces." Pet. App. 97a.

Mr. King ignored the CHP cruiser pursuing him, and sped to an exit off the freeway. *Id.* 97a-98a.[4] The chase continued for eight miles on surface streets, with Mr. King driving in an erratic fashion, slowing down and obeying some traffic signals and speeding up and running red lights at others. *Id.*

Officer Melanie Singer called over her radio for assistance. *Id.* 2a, 97a. Los Angeles Police Department Officers Laurence M. Powell and Timothy E. Wind, along with patrol officers from the Los Angeles Unified School District, responded to the call and joined in pursuit of Mr. King's vehicle. *Id.* 2a, 97a. During the pursuit by the three vehicles, the CHP officers ordered Mr. King by loud-speaker to stop, but he refused to do so. *Id.* 97a.

Mr. King finally came to a stop at an entrance to the Hanson Dam recreation area. *Id.* 2a, 98a. Officer Melanie Singer ordered Mr. King and his companions to exit from the vehicle. *Id.* Mr. King's companions followed these instructions and were taken into custody without incident. *Id.* 98a. Mr. King repeatedly ignored Officer Singer's orders to get out of the automobile. *Id.* 98a. When he eventually emerged from the vehicle, he refused to follow repeated orders to lie on the ground. *Id.*; *see also id.* 2a.

At this point Sergeant Stacey C. Koon arrived, joined moments later by LAPD Officers Theodore J. Briseno and Rolando Solano. *Id.* 2a, 98a. Officer Melanie Singer continued to attempt unsuccessfully to get Mr. King, a "still

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[4] Mr. King was on parole from a robbery conviction. He testified that he did not stop because he did not want to return to prison. Pet. App. 97a.

unsearched felony suspect," *id.* 122a, to lie on the ground with his hands visible. *Id.* 98a. Although Officer Singer unholstered her weapon and "pointed her service revolver at him," Mr. King would not "lie prone" but instead "moved around on his hands and knees." *Id.*

Sergeant Koon commanded Officer Singer to put away her weapon, and the LAPD officers again ordered Mr. King to lie in a prone position. He continued to refuse to do so. *Id.* 2a, 98a. Officers Powell, Wind, Briseno, and Solano then jointly struggled to place Mr. King in a prone position. *Id.* Mr. King was "a large, muscular man" and, "[a]t 6'3" and approximately 225 lbs.," "appreciably larger than both Koon and Powell." *Id.* 98a, 122a. Mr. King "resisted and became combative," throwing off all four officers and "forcing [them] . . . to retreat." *Id.* 98a; *see also id.* 2a.[5]

Mr. King was "sweating profusely," and in light of his "erratic and recalcitrant behavior," the district court concluded that it was "reasonabl[e]" for Sergeant Koon "to have suspected" at this point "that Mr. King was under the influence of PCP." *Id.* 101a. Sergeant Koon fired two taser darts into Mr. King without any apparent effect, reinforcing Sergeant Koon's impression that Mr. King's conduct was the result of PCP. *Id.* 101a. The officers reasonably perceived Mr. King as dangerous; an unsearched felony suspect who was resisting arrest. *Id.* 122a.

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[5] At no time during the arrest did Sergeant Koon come in physical contact with Mr. King.

Mr. King then tried to escape, plunging into a gap between the Hyundai and a police vehicle toward an unlit portion of the Hanson Dam recreation area. *Id.* He "rapidly rose to his hands and knees, and to his feet . . . [,] turned, outstretched his arms forward, and charged towards Officer Powell." *Id.* Officer Powell struck him with a side-handle baton, unintentionally striking Mr. King's head. *Id.* 103a. Mr. King was knocked to the ground but persisted in struggling, attempting to rise, resisting commands to lie prone and continuing to "pos[e] an apparent threat." *Id.* 101a.

The latter portion of the arrest was recorded on videotape by a bystander. *Id.* 2a, 98a-99a. That videotape became the subject of widespread media attention. "It was shown over and over and over again," *Powell* v. *Superior Court*, 283 Cal. Rptr. 777, 780, 232 Cal. App. 3d 785, 790 (1991), "'from Paris to Tokyo,'" as federal prosecutors would later remind the jury, *see* Pet. App. 44a (quoting closing argument); *see also id.* 66a n.35 ("[T]he entire world was aware of the arrest of Rodney King."). The videotape "creat[ed] a vivid impression of a violent encounter." *Id.* 99a. The initial showing "caused shock, revulsion, outrage and disbelief . . . . A fire storm immediately developed in the Los Angeles area, so intense and pervasive was the reaction to the videotape." *Powell*, 283 Cal. Rptr. at 779, 232 Cal. App. 3d at 789.

As the district court found in its sentencing memorandum, however, "careful analysis shows that [the videotape was] . . . sometimes an ambiguous record of the crucial events." Pet. App. 99a. The court of appeals concurred. *Id.* 78a. Even federal prosecutors "agreed that much of the officers' conduct was justified and legal." *Id.* 99a.

Approximately the first minute of the videotape records efforts by Officers Powell and Wind to overcome Mr. King's resistance to arrest and his attempt to escape. *Id.* 2a-3a, 101a. The district court found that Officer Powell's actions during this period did not rise "to the level of criminal deprivation of Mr. King's rights." *Id.* 102a. Following a blow to Mr. King by Officer Briseno at one minute and five seconds into the videotape that Sergeant Koon "could not have anticipated," *id.* 106a, Officers Powell and Wind applied physical force during an interval lasting slightly under 19 seconds that the district court found "crossed the line between legal and illegal behavior." *Id.* 107a; *see also id.* 3a, 102a. The district court found that the application of unlawful force to Mr. King began at 1:07.28 into the videotape and ended at 1:26.00. *See id.* 102a, 107a. At approximately one minute and 30 seconds, Officer Powell gave his handcuffs to Officer Briseno, and 12 seconds later, Mr. King ultimately was handcuffed. *Id.* 102a. A few seconds later, the arrest was completed. *Id.* Sergeant Koon's ultimate conviction was predicated upon his failure to prevent illegal behavior toward Mr. King during the 19-second interval.

2. The First Prosecution

State prosecutors indicted Sergeant Koon and Officers Powell, Wind and Briseno on assault and related charges based on allegations that excessive force was used during the arrest. Pet. App. 4a. The state case was initially assigned for trial in Los Angeles, but the California Court of Appeal determined that the "massive local media coverage" had been "[s]o extensive and pervasive" and the "political fallout" "so intense" that "there [was] a reasonable likelihood that a fair and impartial trial [could

not] be had in Los Angeles County." *Powell*, 283 Cal. Rptr. at 780, 232 Cal. App. 3d at 790.[6] The case was accordingly transferred to and tried in Simi Valley, California. Pet. App. 4a. Sergeant Koon's defense during this trial was "that the force used during the arrest of King was justified and was not excessive." *Id.*[7]

On April 29, 1992, Sergeant Koon was acquitted on all charges. *Id.* His co-defendants were also acquitted of all charges, with the exception of a single assault charge against Officer Powell, on which the jury was unable to return a verdict. *Id.*

The verdicts touched off four days of extensive and widespread rioting in Los Angeles. *See generally* Greg Braxton & Jim Newton, *Looting and Fires Ravage L.A.*, L.A. TIMES, May 1, 1992, at A1. The level and extent of civil disorder during those days were among the worst in California's and, indeed, the nation's history. Fifty-three persons were killed, hundreds were injured, and more than

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[6] Publicity, emotions and the political furor surrounding the Rodney King arrest were so intense that the police chief's status became a "matter of continuing and acrimonious debate," *Powell*, 232 Cal. App. 3d at 799, the publicity eclipsed that connected with heinous crimes such as those involving Charles Manson and the "Hillside Strangler," *id.* at 798, the courts received "a threat of community violence," *id.* at 801, and the "goal of a fair trial in the locality of the crime [was] practically unattainable," *id.*

[7] The district court ultimately found that Sergeant Koon's belief that he acted lawfully, although mistaken, "reflects a personal belief which, at the time of the trial, he held in earnest." Pet App. 117a.

$1 billion in property, including over 5,000 buildings, was destroyed. George J. Church, *Cries of Relief*, TIME, Apr. 26, 1993, at 19; Douglas Jehl & Frederick M. Meier, *Bush Arrives in L.A., Calls for Healing*, L.A. TIMES, May 7, 1992, at A1; Jim Newton, *Officers Guilty, 2 Acquitted*, L.A. TIMES, Apr. 18, 1993, at A1; WILLIAM H. WEBSTER, THE CITY IN CRISIS: A REPORT BY THE SPECIAL ADVISOR TO THE BOARD OF POLICE COMMISSIONERS ON THE CIVIL DISORDER IN LOS ANGELES 23 (Oct. 1992).

3. The Second Prosecution

After the rioting, there were widespread calls from political and community leaders for federal prosecution of petitioner and his co-defendants to quell the anger in Los Angeles over the state court verdicts. Jack Nelson, *Bush Denounces Rioting in L.A. as "Purely Criminal,"* L.A. TIMES, May 1, 1992, at A9. The customary practice of the Department of Justice is not to prosecute an individual who has already been prosecuted under state law "for the same act or acts," except under "compelling" circumstances. *See Rinaldi* v. *United States*, 434 U.S. 22, 24-31 (1977). Federal prosecutors nevertheless obtained an indictment against Sergeant Koon and his co-defendants on August 4, 1992, on charges of violating 18 U.S.C. § 242. Pet. App. 4a. To obtain convictions, federal prosecutors had to prevail on the same central factual issues that had been decided in petitioner's favor by the state jury: "whether Defendants' conduct constituted a use of excessive force, and whether such use was intentional." *Id.* 147a; *see also id.* 14a ("The ultimate issue in the [federal] case was . . . whether [the defendants] . . . willfully used unreasonable force.").

The federal trial commenced on February 25, 1993, in the center of Los Angeles County, within blocks of buildings destroyed in the rioting and looting. *Id.* 4a. The

federal jury returned its verdict on April 16, 1993, but the verdict was not publicly announced until April 17, 1993. *Id.* On the morning of April 17, Los Angeles police, along with 600 National Guardsmen and United States Marines, stood by in the event of another acquittal-inspired riot. Church, *supra*, at 18. The federal jury returned guilty verdicts against Sergeant Koon and Officer Powell, however, and rioting never occurred. *See* Pet. App. 4a.

4. Sentencing

Following a hearing on August 4, 1993, Sergeant Koon was sentenced to a term of thirty months in prison and two years supervised release. Pet. App. 4a. This sentence was imposed for Sergeant Koon's failure to prevent the unlawful application of force against Mr. King by Officers Powell and Wind during the 19-second period immediately prior to the handcuffing of Mr. King. *Id.* 107a.

The district court issued a 54-page detailed, comprehensive compilation of findings and an explanation of its sentencing decision.[8] It began its sentencing

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[8] In making its findings and imposing its sentences, the trial judge, who had presided over the entire seven-week trial and heard all of the evidence, not only held a sentencing hearing, but "reviewed, read, and considered the presentence reports, the addenda thereto, the position papers and sentencing memoranda filed by the defendants and by the Government. The Court [also] . . . reviewed and considered a multitude of letters relating to the trial of this case and sentencing, and letters written in support of the defendants. The Court also . . . considered the United States Sentencing Commission *Guidelines Manual*, . . . , and the arguments of counsel." Pet. App. 95a-96a (footnote omitted).

calculations pursuant to § 2H1.4 of the United States Sentencing Guidelines, which provides that the base offense level for a violation of 18 U.S.C. § 242 is "the greater of (1) 10; or (2) 6 plus the offense level applicable to the underlying offense." Pet. App. 108a. Although petitioner had been acquitted of assault charges in the state trial, the district court agreed with the government that "the appropriate underlying offense" was "aggravated assault," which has a base offense level of 15. *Id.* 112a. The district court increased the base by 4 levels because a "dangerous weapon," *i.e.*, a side-handle baton, had been used by Officer Powell, and by 2 additional levels because the victim sustained "bodily injury," *id.* 115a, to wit: "contusions, [and] perhaps abrasions." *Id.* 105a.[9] Thus, the offense level applicable to the underlying aggravated assault offense" was 21. The district court added that offense level to 6 to obtain a final base offense level of 27 under § 2H1.4. *Id.* 115a, 118a. Based upon the Guidelines Sentencing Table, petitioner's base offense level of 27 and Criminal History Category I combined to prescribe a sentencing range of 70 to 87 months in prison. *Id.* 118a.

The district court also found, however, that "the present case is atypical in several respects," and that the "combined extraordinary circumstances of this case give rise to 'mitigating circumstances' that warrant a departure from the Guidelines range." *Id.* 130a. The court analyzed its departure decision in two categories.

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[9] Mr. King's other injuries were found to have been sustained as a consequence of lawful conduct resulting from efforts to overcome his resistance to arrest and attempt to escape. *See* Pet. App. 115a.

First, the court made a 5-level departure pursuant to Guidelines § 5K2.10, p.s., which expressly authorizes a downward departure "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior." The court catalogued in detail "Mr. King's wrongful conduct," Pet. App. 121a, 122a-123a, which included "illegal conduct prior to and during his arrest," *id.* 121a. Among other things, the court found that Mr. King drove while "admittedly intoxicated," exceeded the speed limit, fled police officers in his vehicle despite their "flashing police lights and sirens," "resisted and evaded arrest, persistently failed to comply with police commands . . . and attempted to escape." *Id.* 121a-122a. The use of force was "provoked substantially, if not entirely, by Mr. King." *Id.* 122a. Sergeant Koon was convicted for failing to prevent "conduct which began as a legal use of force against a resistant suspect and subsequently crossed the line to unlawfulness, all in a matter of seconds, during the course of a dynamic arrest situation." *Id.* 123a. Even though "Mr. King's provocative behavior eventually subsided," *id.* 123a, the court determined that the entire incident "would not have escalated to [the] point [of unlawful activity], indeed it would not have occurred at all, but for Mr. King's initial misconduct." *Id.*

Such provocative victim misconduct, the court concluded, was sufficiently unusual to move this case outside the "heartland" of offenses governed by the applicable Guidelines, thereby justifying a downward departure pursuant to § 5K2.10, p.s. *Id.* 124a. Based upon the factors set forth in that provision, its extensive and detailed factual findings, as well as "the overall standards and policies of the Guidelines, and its own discretion in attempting to fashion a fair sentence," *id.* 132a, the court determined that a 5-level departure was appropriate to

distinguish Sergeant Koon's conduct from cases involving "deliberate and unprovoked assaultive conduct." *Id.* 124a.

Second, "[b]ased on a convergence of three additional factors," *id.* 134a, the district court made an additional 3-level downward departure. The court relied upon the following factors:

(1) **"Additional Punishment."** Sergeant Koon has "already sustained, and will continue to incur, punishment in addition to the sentence imposed." *Id.* 120a, 124a-126a. In that regard, "[t]he extraordinary notoriety and national media coverage of this case, coupled with . . . [his] status as [a] police officer[ ], make [Sergeant] Koon . . . unusually susceptible to prison abuse." *Id.* 120a. Sergeant Koon also "will be subjected to multiple adversarial proceedings and stripped of . . . [his] position and tenure by the LAPD." *Id.*

(2) **"Absence of Need to Protect the Public."** "[A]dequate deterrence to criminal conduct" is an express statutory sentencing factor. *Id.* 128a. "[T]here is no evidence, and the government does not argue, that . . . [Sergeant] Koon . . . [is] dangerous or likely to commit crimes in the future." *Id.* 120a, 128a-129a.

(3) **"Successive State and Federal Prosecutions."** Under the extraordinary circumstances of this case, "the successive state and federal prosecutions, though legal, raise a specter of unfairness." *Id.* 120a. Indeed, the court found that Sergeant Koon was indicted and tried a second time "only after a state court jury acquitted . . . [him] of charges based on the same underlying conduct," *id.*, creating "an unusual circumstance, and significantly burden[ing] the defendants," *id.* 130a.

While none of these factors, "[s]tanding alone," justified a departure from the Guidelines, *id.* 120a, the court found that "taken together" (*id.* 121a) this "complex of three factors" justified a 3-level departure, *id.* 134a.

The total 8-level downward departure reduced the offense level for Sergeant Koon to 19, resulting in a Guidelines sentencing range of 30 to 37 months. As noted above, the court sentenced him to 30 months in prison and two years of supervised probation.

Sergeant Koon entered prison on October 12, 1993, after his applications for bail pending appeal were denied. *See Koon* v. *United States*, 114 S. Ct. 296 (1993) (mem.); *United States* v. *Koon*, 6 F.3d 561 (9th Cir. 1993).

B. The Decision Of The Court Below

On August 19, 1994, the court of appeals affirmed Sergeant Koon's conviction but reversed the district court's sentencing decision. The court reviewed de novo the district court's decision to exercise its discretion to depart downward from the sentence range prescribed by the Guidelines. *See* Pet. App. 57a ("We review de novo whether the district court had authority to depart.").

The court of appeals rejected the district court's 5-level departure for provocative victim misconduct, even though that factor is expressly authorized by the Guidelines as a ground for departure and despite recognition by the court that conduct by a victim provoking an incident could in some circumstances provide the predicate for a downward departure in a police misconduct case, depending on the particular facts. *See id.* 76a n.38. The court did not question the district court's findings of "King's misconduct" — "speeding, driving while intoxicated, fleeing in his car from pursuing police officers, refusing to

obey the officers' commands to get on the ground and remain prone, attempting to escape from police custody, charging Powell." *Id.* 70a. Nor did the court take issue with the district court's findings that, absent Mr. King's misconduct prior to and during the arrest, the 19-second incident that formed the basis of Sergeant Koon's conviction would never have happened.

The court of appeals nevertheless reversed the district court's finding that victim misconduct warranted a downward departure in this case. In doing so, the court did not cite any language in the Guidelines or sentencing statutes. It relied instead on general sentencing policies and this Court's excessive force analysis in *Graham* v. *Connor*, 490 U.S. 386 (1989). Based on that analysis, the court of appeals rejected the district court's findings that Mr. King's provocative and wrongful behavior, coupled with the volatile and "dynamic arrest situation," made this case sufficiently unusual to justify departing from the Guidelines. *See* Pet. App. 73a-76a.

The court of appeals also reversed the district court's 3-level departure. The court declared that the three factors considered by the district court were impermissible considerations "as part of the decision to depart." *Id.* 59a. Again, the court did not point to any textual basis for deciding that the respective factors relied on by the district court were prohibited from consideration in the context of a departure. Rather, it engaged in an extended analysis of its view of the "structure and purposes of the Guidelines and the federal sentencing statutes." *Id.*; *see id.* 59a-69a. "In sum," the court concluded, "consideration of any of the factors identified by the district court to support the three-level departure, separately or collectively is, *under the facts of this case*, inconsistent with the structure and policies of

the Guidelines. These factors are improper grounds on which to rest a departure." *Id.* 69a (emphasis added).

The court of appeals remanded the case to the district court for resentencing.[10]

C. The Denial Of The Petition For Rehearing And Suggestion For Rehearing *En Banc* And The Opinion Of The Dissenting Judges

The court of appeals denied Sergeant Koon's petition for rehearing and suggestion for rehearing *en banc*. Nine judges (Reinhardt, Pregerson, Wiggins, Kozinski, Noonan, Hawkins, O'Scannlain, T.G. Nelson, and Kleinfeld, JJ.) dissented from that order. Pet. App. 81a.

In an opinion written by Judge Reinhardt, the dissenters argued that "the panel seriously erred in vacating the downward departures ordered by Judge Davies." *Id.* 81a. They explained that

> the district court acted well within its discretion in sentencing the defendants to prison terms below the Guidelines range. Sergeant Koon and Officer Powell were first-time offenders. The sentences ordered by Judge Davies were severe indeed. Neither law nor justice requires that they be set aside or that any longer prison terms be imposed.

Id.

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[10] The court of appeals subsequently granted petitioner's motion for a stay of its mandate pending the filing of a petition for writ of certiorari in this Court, and that stay will remain in effect until this Court's final disposition of this case. Pursuant to the sentence originally imposed by the district court, Sergeant Koon has been released from prison but remains incarcerated in a half-way house. He will have completed the sentence imposed by the district court on December 14, 1995.

The dissenting judges rejected the standard of appellate review applied by the panel in reversing the district court's departure from the Guidelines. They noted that the "panel's decision squarely conflicts with the considerably more flexible approach adopted by the First Circuit in" *United States* v. *Rivera*, 994 F.2d 942 (1st Cir. 1993). Pet. App. 89a-90a. The panel had taken a "mechanical and inflexible approach" that "casts aside the basic principles that should underlie judicial sentencing, even in the age of the Guidelines," and had thus impermissibly "encroach[ed] on district court discretion." *Id.* 81a. "Indeed, under the panel's view of the district judge's role in sentencing, district courts would be divested of much of the limited discretion they retain under the Guidelines." *Id.* 82a.

Accordingly, the dissenting judges concluded that, "[i]n choosing to apply a highly limited view of judicial discretion to the case of Koon and Powell, the panel accomplishes little except to undo a perfectly proper sentence, and to treat the defendants in a harsh and unfair manner." *Id.* 89a.

SUMMARY OF ARGUMENT

The decision below strips virtually all discretion from sentencing judges and makes every sentence reviewable de novo if any deviation is made from the Sentencing Guidelines. Such a result is not authorized or required by the Sentencing Reform Act or the Sentencing Guidelines, is contrary to historic practice and will create an administrative nightmare for the federal appellate courts.

1. This Court has identified a number of factors for determining the proper standard of appellate review of particular types of trial court determinations. *See, e.g.*, *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990); *Pierce* v. *Underwood*, 487 U.S. 552 (1988). All of these factors strongly support application of the deferential, abuse-of-discretion standard to district court decisions exercising discretion to depart from the range of sentences imposed by the Sentencing Guidelines.

a. The language and structure of the Sentencing Reform Act demonstrate that abuse-of-discretion is the appropriate standard of review. The Act expressly required the Sentencing Commission to maintain "sufficient flexibility to permit individualized sentencing" where warranted by mitigating or aggravating factors not fully and expressly addressed by the Sentencing Guidelines themselves. *See* 28 U.S.C. § 991(b)(1)(B). Congress intentionally "preserve[d] for the judge the discretion to depart from" the Guidelines range pursuant to 18 U.S.C. § 3553(b). *Mistretta* v. *United States*, 488 U.S. 361, 367 (1989). The Sentencing Commission, in turn, gave district courts the discretion to depart from the Guidelines range of sentences in "unusual" or "atypical" cases. Except for a few expressly articulated prohibitions set forth in the Guidelines, the Commission has declared, and this Court has recognized, that neither the Act nor the Guidelines limit the number of potential factors that may warrant departure in an unusual case. *See, e.g.*, U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b); *Burns* v. *United States*, 501 U.S. 129, 136-37 (1991).

The Act authorizes only limited, narrow appellate review of district court sentencing decisions. *Williams* v. *United States*, 503 U.S. 193, 195, 199 (1992). It does not, on its face, authorize de novo review of any

issue. On the contrary, it expressly requires deferential "clearly erroneous" review of district court factual findings, and instructs the courts of appeals to give "due regard" to the district court's opportunity "to judge the credibility of witnesses" and also to give "due deference to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e).

While the Act does not define precisely what level of deference is "due" a departure decision, the abuse-of-discretion standard is clearly the most appropriate standard. The text of the Act shows that Congress sought to preserve "individualized sentencing" in unusual cases and intended that courts of appeals defer to district court discretionary judgments. The decision to depart from the Guidelines is a quintessential exercise of sentencing discretion, and, accordingly, calls for an abuse-of-discretion standard of review on appeal.

b. Application of the abuse-of-discretion standard to departure decisions is likewise consistent with historical appellate practice in the federal judicial system. Federal district courts traditionally enjoyed broad discretion to impose criminal sentences within statutory limits. Throughout much of the nation's history, federal appellate courts deferred almost completely to district court sentencing determinations. And, as this Court recognized in *Williams*, 503 U.S. at 205, the Sentencing Reform Act was *not* intended, except where expressly provided, to "alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion." Nothing in the Act suggests that Congress intended to eliminate the traditional deference on appeal to a district court's exercise of discretion when departing from the Guidelines.

c. The abuse-of-discretion standard comports with, and will materially further, the "sound administration of

justice" because district courts are in the best institutional position to determine whether the specific facts and circumstances at issue are so unusual that a departure from the Guidelines is appropriate to ensure a fair and just punishment. Congress recognized that affording district courts discretion to depart from the Guidelines would provide the Sentencing Commission with an important resource for revising the Guidelines to take into account factors that were not adequately considered by the Commission in its prior deliberations. De novo appellate review of departure decisions would be inconsistent with this carefully crafted framework, allowing the courts of appeals to make sentencing policy decisions that are, by statute, reserved for the Commission.

d. The complex and highly individualized nature of the issues involved in a departure decision also militates decisively in favor of the abuse-of-discretion standard. When a district court determines that a case, because of its peculiar facts and circumstances, is "unusual" or "atypical," the court is, by definition, engaging in precisely the sort of *sui generis* inquiry that is not likely to be replicated and is incapable of useful generalization.

2. The district judge acted well within his discretion to depart downward in this case.

a. The district court's decision to depart 5 levels on the basis of provocative victim misconduct was not an abuse of discretion. The district court's 5-level departure involved an application of the Guidelines to the peculiar and extraordinary facts of this case. The Guidelines expressly authorize and encourage consideration of departure from the Guidelines in cases of victim provocation, and nothing in the text of the relevant Guidelines or statutes restricts consideration of the circumstances of the victim's conduct in an excessive force

case. The district court made detailed and thorough findings that Mr. King's repeated and persistent acts of unlawfulness and provocation prompted the offense conduct, providing an ample basis for the downward departure.

b. Nor did the district court abuse its discretion in making its 3-level departure. The district court properly relied on a combination of factors that are not withdrawn from district court consideration by the Guidelines. The court found, on the facts of this case, that the convergence of special factors made the case unusual. That determination was an entirely proper exercise of discretion entitled to full respect and deference on appeal.

ARGUMENT

I

THE DEFERENTIAL, ABUSE-OF-DISCRETION STANDARD OF REVIEW APPLIES TO DISTRICT COURT DECISIONS TO DEPART FROM THE SENTENCING GUIDELINES

This Court confronts frequently the question of the proper standard of appellate review for particular types of trial court determinations. *See, e.g., Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990). While the Court has not attempted "to discern or to create a comprehensive test" for deciding what standard of review governs an issue, *Pierce* v. *Underwood*, 487 U.S. 552, 559 (1988), it has identified "significant relevant factors [that] call for an 'abuse of discretion' standard." *Id.* at 559. Such factors include: (1) "the language and structure of the governing statute," *id.*; (2) "historical tradition," *id.* at 558; (3) whether "'as a matter of sound administration of justice'" the district court is in a better position than the court of appeals to decide the issue, *id.* at 559-60 (quoting *Miller* v.

Fenton, 474 U.S. 104, 114 (1985)); and (4) "'the sheer impracticability of formulating a rule of decision for the matter in issue" due to the fact that the issue involves "'multifarious, fleeting, special, narrow facts that utterly resist generalization,'" *id.* at 561-62 (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 662-63 (1971)). As demonstrated below, all four of these factors strongly favor deferential, abuse-of-discretion review of district court sentencing decisions.

A. The Language And Structure Of The Sentencing Reform Act Demonstrate That Abuse-Of-Discretion Is The Proper Standard Of Review

The language and structure of the Sentencing Reform Act require application of the abuse-of-discretion standard of review to district court decisions to depart from the range of sentences established by the Sentencing Guidelines. Congress intended for district courts to retain discretion to depart from the Guidelines range in unusual or atypical cases. The Sentencing Commission, in implementing the Act, has delineated certain factors that cannot be considered as a basis for departure and declared that, other than these factors, there are no prescribed limits on the types of factors that may form the basis of a departure.

Congress authorized "limited" and "narrow" appellate review of district court departure decisions. *Williams*, 503 U.S. at 196, 199. But, Congress intended for the courts of appeals to defer to district court discretionary judgments about whether a departure is warranted on the facts of a particular case. Absent language in the text of the relevant Guidelines or statutes expressly prohibiting departure on particular grounds, therefore, the decision of a district court to depart from the Guidelines is a quintessential exercise of

discretion that may be reviewed on appeal only for an abuse of that discretion.

1. The Sentencing Reform Act And Its Implementing Guidelines Authorize Federal District Courts To Exercise Their Discretion And Depart From The Guidelines In Unusual Or Atypical Cases

Congress enacted the Sentencing Reform Act to limit the sentencing discretion of federal district courts in ordinary cases and thereby to eliminate sentencing disparities in comparable cases. *See generally Mistretta* v. *United States*, 488 U.S. 361, 364 (1989). Although Congress sought to establish criteria to guide the exercise of the federal sentencing power, it did not intend to "remove all of the [district] judge's sentencing discretion." S. REP. No. 225, 98th Cong., 1st Sess. 51 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3234. Indeed, Congress "'desire[d] to leave substantial sentencing discretion in the hands of the sentencing judge.'" *Nichols* v. *United States*, 114 S. Ct. 1921, 1930 n* (1994) (Souter, J., concurring in the judgment) (quoting Marc Miller & Daniel J. Freed, *Honoring Judicial Discretion Under the Sentencing Reform Act*, 3 FED. SENT. R. 235, 238 (1991)). Congress, therefore, rejected a system of "strict determinate sentencing," and instead established a guidelines system that would "reduc[e] sentence disparities while retaining the flexibility needed to adjust for unanticipated factors arising in a particular case." *Mistretta*, 488 U.S. at 367.

Congress created the United States Sentencing Commission and authorized it to establish Sentencing Guidelines that "maintai[n] *sufficient flexibility to permit individualized sentences* when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C.

§ 991(b)(1)(B) (emphasis added). As the Senate Report on the Act states, the Guidelines were "not intend[ed] . . . [to] be applied in a mechanistic fashion." S. REP. NO. 225, *supra*, at 52, *reprinted in* 1984 U.S.S.C.A.N. at 3235. Rather, the Senate Committee

> believe[d] that the sentencing judge has an obligation to consider all relevant factors in a case and impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluation of the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

Id.

Recognizing that "each offender stands before a court as an individual, different in some ways from other offenders" and that "[t]he offense, too, may have been committed under highly individual circumstances," the Senate Committee concluded:

> Even the fullest consideration and the most subtle appreciation of the pertinent factors — the facts in the case; the mitigating or aggravating circumstances; the offender's characteristics and criminal history; and the appropriate purposes of the sentence to be imposed in the case — cannot invariably result in a predictable sentence being imposed. Some variation is not only inevitable, but desirable.

S. REP. NO. 225, *supra*, at 150, *reprinted in* 1984 U.S.S.C.A.N. at 3333.

Congress therefore directed federal district judges generally to impose a sentence within the range prescribed by the Sentencing Guidelines, 18 U.S.C. §§ 3553(a)(4), (b), but "preserve[d] for the judge the discretion to depart from" that prescribed range in certain cases pursuant to 18 U.S.C. § 3553(b). *Mistretta*, 488 U.S. at 367. The Act authorizes a departure if the trial "court *finds* that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b) (emphasis added). In fact, the departure finding is precluded only if the proposed departure factor was not adequately considered by the Sentencing Commission based "*only* [on] the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." *Id.* (emphasis added); *Stinson* v. *United States*, 113 S. Ct. 1913, 1917 (1993). Thus, the Act expressly authorizes a trial court to "find" a basis for a departure decision unless Sentencing Commission Guidelines, policy statements or commentaries have explicitly and adequately considered that factor.

The Sentencing Guidelines implement the Act's grant of discretion to sentencing judges by recognizing explicitly that a district court has discretion to depart from the Guidelines in an "unusual" or "atypical" case. U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b). Indeed, the Sentencing Commission intended for each guideline to "carv[e] out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." *Id.* The Guidelines establish a formula for calculating the appropriate sentence for cases that fall within this heartland. A district court may, however, depart from the Guidelines calculations in a case in "which a particular guideline linguistically applies but where conduct significantly differs from the norm." *Id.*

The Commission expected that departures from the Guidelines, when they occurred, would be part of the initial process by which the Guidelines evolved. Thus, the Commission stated that "[b]y monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so . . . the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted." *Id.*

With the exception of a limited number of specifically stated forbidden grounds for departure,[11] therefore, the Commission did "not intend to limit the kinds of factors, whether or not mentioned anywhere in the guidelines, that could constitute grounds for departure in an unusual case." *Id.* [T]he Guidelines place essentially no limit on the number of potential factors that may warrant a departure." *Burns* v. *United States*, 501 U.S. 129, 136-37 (1991).

The Guidelines specifically encourage departure based on certain factors, *see, e.g.*, U.S.S.G. Pt. 5K; *id.* § 2G1.1, comment., such as a crime victim's own misconduct that provokes the offense behavior, *id.* § 5K2.10. The Commission deemed certain other factors, such as the age of the wrongdoer, as not "ordinarily" warranting departure, *id.*, Ch. 5, Pt. H intro. comment.; *id.* § 5H1.1, p.s., but

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[11] A district court may not depart on the basis of race, sex, national origin, creed, religion, and socio-economic status, U.S.S.G. § 5H1.10, p.s.; lack of guidance as a youth and similar circumstances, *id.* § 5H1.12, p.s.; physical condition, including drug dependence and alcohol use, *id.* § 5H1.4, p.s.; or coercion and duress, *id.* § 5K2.12, p.s. *See id.*, Ch. I, Pt. A, intro. comment. 4(b). None of these factors was relied upon by the district court here in making its departures.

even these factors may provide grounds for departure if they are present in an extraordinary or unique way, *id.* § 5K2.0, p.s. As long as the district court finds that a case is "unusual" based on factors not expressly rejected by the Guidelines or already expressly taken into account by the Guidelines for the relevant offense conduct, the district court is given "legal freedom" to exercise its discretion to depart. *Id.*, Ch. 1, Pt. A, intro. comment. (4)(b); *see Rivera*, 994 F.2d at 949 (the sentencing court "retains . . . freedom to depart whether such departure is encouraged, discouraged, or unconsidered by the Guidelines").

The reason for affording such latitude in the context of departures is clear. As the Commission has acknowledged, "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision," especially during these early stages of the Guidelines system. U.S.S.G., Ch. 1, Pt. A, intro. comment. (4)(b). Moreover, the Commission recognized that, even with continuing revision of the Guidelines, there would always be grounds for departure that "cannot, by their very nature, be comprehensively listed and analyzed in advance." *Id.*, § 5K2.0, p.s.

In short, except for a limited category of expressly prohibited considerations, a district court has discretion to depart from the Sentencing Guidelines based on circumstances that render a case outside the normal range of the fact pattern to which the prescribed Guideline range was intended to apply.

2. The Sentencing Reform Act Requires Abuse-Of-Discretion Review That Respects District Court Discretionary Judgments To Depart From The Guidelines

Congress provided for appellate review of departure decisions pursuant to 18 U.S.C. § 3742.[12] But as this Court has recognized, that review is "narrow" and "limited." *Williams*, 503 U.S. at 196, 199. The statutory language — the starting point for determining the standard of appellate review, *see Pierce*, 487 U.S. at 558-59 — does not contain *any* provision explicitly authorizing de novo review of district court sentencing decisions. "Congress could easily have used the phrase 'de novo' or 'plenary' if it had wanted to confer such broad review power." Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. CAL. L. REV. 621, 636 (1992).

Congress did, however, employ language that requires deference to district court decisions. For example, the Act requires that

> [t]he court of appeals shall give *due regard* to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are *clearly erroneous* and shall give *due deference* to

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[12] If the district court departs upward from the prescribed guideline range, the defendant may obtain appellate review of the sentence. *See* 18 U.S.C. § 3742(a); *Williams*, 503 U.S. at 198-99. Conversely, if a downward departure occurs, the government may appeal the sentence. *See* 18 U.S.C. § 3742(b); *Williams*, 503 U.S. at 199.

> the district court's application of the guidelines to the facts.

18 U.S.C. § 3742(e) (emphasis added).[13]

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[13] The legislative history of 18 U.S.C. § 3742 confirms that Congress intended for appellate courts to review departure decisions with deference. Commenting on the original version of 18 U.S.C. § 3742 enacted as part of the Sentencing Reform Act of 1984, the Senate Report recognized that the Section 3742 established only "a *limited* practice of appellate review of sentences," S. REP. NO. 225, *supra*, at 149 (emphasis added), *reprinted in* 1984 U.S.C.C.A.N. at 3332. The Senate Committee stated that, while the appellate review provisions were intended to control and guide sentencing discretion, they were also "designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court." S. REP. NO. 225, *supra*, at 150, *reprinted in* 1984 U.S.C.C.A.N. at 3333.

In 1988, Congress reaffirmed in even more forceful language its direction that appellate sentencing review should be deferential. The original version of 18 U.S.C. § 3742(e), as enacted in 1984, did not contain a requirement that appellate courts "give due deference to the district court's application of the guidelines to the facts." *See* Pub. L. No. 98-473, Ch. II, § 213, 98 Stat. 2012. That requirement was added by Congress as part of the Omnibus Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7103(a)(7), 102 Stat. 4181, 4417. The congressional statement concerning the amendment explained that, although a de novo standard should apply to appellate review of "a district court determination of a legal question," it would be "inappropriate" for an appellate court to engage in de novo review of questions involving application of the Guidelines — *even those questions for which "the overall determination is*

The Act states that departures shall be based upon a "find[ing]" that certain circumstances exist, 18 U.S.C. § 3553(b), and also states that an appeals court "shall affirm" reasonable departures. *See* 18 U.S.C. § 3742(f)(2)-(3); *Rivera*, 994 F.2d at 952. It provides that an appellate court may reverse a sentencing judge's departure decision only if "the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. § 3742(f)(1), or "the sentence is unreasonable," 18 U.S.C. § 3742(f)(2); *see Williams*, 503 U.S. at 202. While the Act does not expressly define what standard of appellate review applies to a district court's decision to depart from the Guidelines range, the language and structure of the Act strongly support application of an abuse-of-discretion standard and leave virtually no room for any other construction.

By taking the unusual step of expressly requiring "clearly erroneous" review of factual findings, and mandating that appellate courts give "due regard" to the district court's opportunity to participate directly in the trial and "due deference" to the district court's application of the Guidelines to its factual findings, Congress clearly intended to give the district courts latitude to make discretionary judgments where the Guidelines themselves do not expressly remove the court's discretion. Moreover, the Act declares that Congress intended to "maintai[n] sufficient *flexibility* to permit *individualized sentences* when

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not an objective finding of fact" and "not uniquely within the district court's expertise." 134 CONG. REC. H11257 (daily ed. Oct. 21, 1988) (emphasis added).

warranted by mitigating or aggravating factors not taken into account" by the Sentencing Commission. 28 U.S.C. § 991(b)(1)(B) (emphasis added). This textual emphasis on flexibility and individualized sentences in departure cases "emphasizes the fact that the determination is for the district court to make, and thus suggests some deference to the district court upon appeal." *Pierce*, 487 U.S. at 559.

The need for deference on appeal is particularly compelling in the context of a district court's decision to depart from the Guidelines in an unusual case — a quintessential exercise of judicial discretion. Indeed, "a decision to depart from the guidelines represents the ultimate exercise of discretion within the framework of the Act." Zipperstein, *supra*, 66 S. CAL. L. REV. at 635. The abuse-of-discretion standard is therefore the most obvious and appropriate standard for review of such decisions, and it is entirely consistent with the statute and the Guidelines.

As one commentator has observed,

> The abuse-of-discretion standard allows appellate courts enough control over district court decisionmaking to ensure compliance with the guidelines. At the same time, it keeps enough review power out of the hands of the appellate courts to ensure that they too remain faithful to the guidelines. . . . [A]ppellate courts exceed their authority when they effectively add new provisions to the guidelines, when they announce new criteria permitting departures, and when they otherwise use the power of de novo review to announce rules that undermine the purposes of guidelines.

Id. at 638.[14]

A district court's finding in a particular case that "there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission," 18 U.S.C. § 3553(b), may, in rare cases, raise a "quintessentially legal" question involving the interpretation of "a set of words" of a statute or Guideline that might appropriately be reviewed de novo on appeal. *Rivera*, 994 F.2d at 951. The *Rivera* court, for example, noted that "plenary review is appropriate where the question on review is simply whether or not the allegedly special circumstances (i.e., the reasons for departure) are the 'kind' that the Guidelines, *in principle*, permit the sentencing court to consider at all." *Id.* (emphasis in original). But these instances will necessarily be rare. Indeed, the Sentencing Commission has identified only a handful of factors that cannot, as a matter of law, be considered in making a departure, *see, e.g.*, page 26 n.11, *supra*, and announced that it otherwise does "not intend to limit the kinds of factors . . . that could constitute grounds for departure in an unusual case." U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b). In fact, "the Commission itself has explicitly *said* that (with a few exceptions), it did not 'adequately' take *unusual* cases 'into consideration.'" *Rivera*, 994 F.2d at 947 (emphasis in original). Accordingly, "appellate courts should review the district court's determination of 'unusualness' with 'full awareness of, and respect for, the trier's superior "feel" for the case,'

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[14] The author of the quoted article is the Chief Assistant U.S. Attorney in the Los Angeles office that prosecuted Sergeant Koon.

not with the understanding that review is 'plenary.'" *Id.* at 952 (citations omitted).

B. Historical Tradition Requires An Abuse-Of-Discretion Standard For Review Of District Court Departure Decisions

As this Court has recognized, "a long history of appellate practice" may also militate in favor of a particular standard of review. *Pierce*, 487 U.S. at 558. By this measure, abuse-of-discretion review is appropriate for sentencing departures in light of the long tradition of appellate deference to district court sentencing determinations.

Throughout much of the nation's history prior to the enactment of the Sentencing Reform Act, federal district courts possessed extraordinarily broad discretion in criminal sentencing. *Mistretta*, 488 U.S. at 363-64. As a general matter, the district court could "conduct an inquiry broad in scope, largely unlimited either as to the kind of information" considered "or the source from which" that information came. *Witte* v. *United States*, 115 S. Ct. 2199, 2205 (1995) (quotations omitted); *see, e.g., Wasman* v. *United States*, 468 U.S. 559, 563 (1984); *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); *Williams* v. *New York*, 337 U.S. 241, 246 (1949). A sentencing judge considered "'every aspect of the defendant's life,'" *Wasman*, 468 U.S. at 572 (quoting *Williams*, 337 U.S. at 250), taking into account "'a wide variety of factors in addition to evidence bearing on guilt,'" *Nichols* v. *United States*, 114 S. Ct. 1921, 1928 (1994) (quoting *Wisconsin* v. *Mitchell*, 113 S. Ct. 2194, 2199 (1993)), and arrived at an independent determination of the appropriate sentence, usually constrained only by constitutional requirements, *see, e.g., Solem* v. *Helm*, 463 U.S. 277 (1983), and the "customarily

wide range" of punishment prescribed by statute, *Mistretta*, 488 U.S. at 364.

On appeal, the sentencing judge's decision was "met with virtually unconditional deference" by appellate judges. *Mistretta*, 488 U.S. at 364. Thus, "a sentence imposed by a federal district judge, if within statutory limits," was "generally not subject to review." *Tucker*, 404 U.S. at 447.

Application of an abuse-of-discretion standard of review to district court Guidelines departure decisions is fully consistent with, and required by, this historical practice. In *Williams*, this Court held that the Sentencing Reform Act was *not* intended to displace district court discretion or to intensify appellate review except in those areas expressly stated. As the Court declared:

> Although the Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion. The selection of the appropriate sentence from within the guideline range, *as well as the decision to depart from the range in certain circumstances, are decisions that are left solely to the sentencing court.*

Williams, 503 U.S. at 205 (emphasis added). "[E]xcept to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Williams*, 503 U.S. at 205 (quoting *Solem*, 463 U.S. at 290 n.16).

Congress vested district courts with discretion to depart from the Guidelines in unusual cases. But it "did not alter

[the] court of appeals' traditional deference to a district court's exercise of its sentencing discretion." *Id.* Indeed, the Act includes numerous provisions confirming that such deference should continue. Historical practice, therefore, is consistent with the language of the Act, its history, the Guidelines, and this Court's decisions, that an abuse-of-discretion review standard should be applied to district court departure decisions.

C. The Sound Administration Of Justice Favors The Abuse-Of-Discretion Standard Because District Courts Are In A Better Position Than The Courts Of Appeals To Determine Whether A Case Is Unusual Or Atypical

Application of the abuse-of-discretion standard of review for departure decisions is also appropriate because, "as a matter of the sound administration of justice," the district court is in the best position to determine whether a departure is warranted. *See generally Pierce*, 487 U.S. at 559-60 (in determining the proper standard of review, "sometimes the decision 'has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question'") (quoting *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985)); *see, e.g., Cooter & Gell*, 496 U.S. at 403-04. Indeed, there can be no doubt that the district court is in the best position to decide whether the facts and circumstances of a case are so unusual that a departure from the Guidelines is warranted. As a result of direct participation in the trial and sentencing proceedings, "the sentencing judge 'sees more and senses more' than the appellate court," and "'enjoy[s] the superiority of his nether position.'" *Mistretta*, 488 U.S. at 364 (quoting Rosenberg, *supra*, 22 SYRACUSE L. REV. at 663).

"Appellate review under the guidelines must respect the legislative framework established by Congress as well as the authority of the Sentencing Commission as the arbiter of sentencing policy." Zipperstein, *supra*, 66 S. CAL. L. REV. at 638. Abuse-of-discretion review of district court departure decisions is the only mode of review consistent with the institutional framework established by the Act. Deference to district court determinations regarding the unusualness of a case effectuates the congressional intent that the *Sentencing Commission* — not the courts of appeals — develop the rules regarding which factors are to be considered in sentencing. *Cf. Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (noting that the congressional directive for the Sentencing Commission "'periodically [to] review and revise' the Guidelines" justifies the Supreme Court in being "more restrained and circumspect in using . . . [its] certiorari power"). As *Rivera* explains, "[t]o ignore the district court's special competence — about the 'ordinariness' or 'unusualness' of a particular case — would risk depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case, which reactions, reduced to written reasons for departure, can help the Commission determine whether, and how, Guidelines revision should take place." 994 F.2d at 951.

D. The Multifarious, Novel Nature Of The Issues Involved In Departure Decisions Makes Abuse-Of-Discretion The Appropriate Standard of Review

Deference to district court departure decisions is also consistent with the general principle that a district court should have discretion in making decisions that are bound up in the facts and circumstances of the specific case. A departure determination ultimately involves "a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or unusual,

ordinary or not ordinary, and to what extent." *Rivera*, 994 F.2d at 951. Such a fact-intensive judgment does not easily lend itself to fixed legal rules since the particular facts underlying departure decisions are likely to vary significantly from one case to another. "[B]ecause the number of possible situations is large," this Court should be "reluctant either to fix or sanction narrow . . . [rules] for the district courts to follow" in making these determinations. *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 10-11 (1980).

Indeed, the determination whether a particular factual situation is an atypical case will, by definition, not be an issue likely to recur in another case. There is therefore little need to treat the issue as a question of law. *Cf. United States* v. *Kim*, 23 F.3d 513, 517 (D.C. Cir. 1994) ("A district court's determination that a given set of facts constitute 'obstruction of justice' (as the guidelines use that term) or involve more than minimal planning, will typically not be exactly replicated in any other case. And therefore there is less reason to insist on the uniformity that a question of law typically requires.").

"The highly situation-specific nature of the Guidelines factors suggests that appellate courts should accord great deference to ensuing district court determinations — both with respect to the threshold decision to impose a sentence below the Guidelines in the first instance, as well as to the district court's determination of the extent of departure warranted." *United States* v. *Yellow Earrings*, 891 F.2d 650, 654-55 (8th Cir. 1989). These determinations present "precisely" the type of "multifarious and novel question" that is "little susceptible . . . of useful generalization, and likely to profit from the experience that an abuse-of-discretion rule will permit to develop." *Pierce*, 487 U.S. at 562; *see also Cooter & Gell*, 496 U.S. at 404 (same).

II

THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION WHEN IT DECIDED TO MAKE DOWNWARD DEPARTURES FROM THE GUIDELINES IN THIS CASE

A. The District Court Acted Within Its Discretion When It Made A 5-Level Departure Based Upon Provocative Victim Misconduct, An Explicitly Encouraged Basis For Departure Under The Guidelines

1. The 5-Level Victim Misconduct Departure Is Subject Only To Abuse-Of-Discretion Review

The district court's decision to make a 5-level departure based on Mr. King's conduct in this case is subject only to abuse-of-discretion review on appeal. Section 5K2.10 of the Guidelines provides: "If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guidelines range to reflect the nature and circumstances of the offense." Thus, there is no statutory prohibition of consideration of a victim's conduct as a basis for departure in this case. The Guidelines encourage the district judge to do so. Indeed, there can be no question that a victim's wrongful conduct is "of the 'kind' that the Guidelines, *in principle*, permit the sentencing court to consider" (*Rivera*, 994 F.2d at 951) as a basis for departure since the victim's conduct is specifically authorized and *encouraged* as a basis for departure pursuant to § 5K2.10, p.s.

Neither the text of the Guideline applicable to Sergeant Koon's offense, § 2H1.4, nor the commentary to that Guideline reveals any basis for concluding that victim provocation may not be a departure factor in excessive force cases. In fact, although the commentary to § 5K2.10, p.s., lists several types of offenses for which a § 5K2.10

departure is inappropriate, excessive force and other civil rights cases governed by § 2H1.4 are *not* included among that list. *See* U.S.S.G. § 5K2.10 comment. (victim misconduct departure ordinarily not appropriate for sexual abuse and property offenses). And even the Ninth Circuit acknowledged that a victim's provocation could conceivably provide a basis for departure in excessive force cases. *See* Pet. App. 76a n.38 ("We do not conclude that a departure for victim misconduct would *never* be permissible in a public case.").

The closest the Ninth Circuit could come to finding any textual support for its decision that the departure here was improper was to assert that the "structure of § 2H1.4" prohibits victim misconduct departures in cases involving public officials because § 2H1.4 "punishes those vested with governmental authority *more* severely than private actors who are guilty of comparable conduct." Pet. App. 74a. The fact that governmental actors are generally punished more severely than non-governmental actors, however, is hardly a sufficient textual basis from which a court may determine, as a matter of law, that victim provocation is not an appropriate basis for departure in this case. Indeed, by that method of statutory interpretation, no departure on *any* ground would ever be permitted in excessive force cases because any departure would reduce the sentence imposed on a public official. Neither the Act nor the Guidelines contemplates such a result.

Absent any statutory or Guidelines text upon which to rely, the Ninth Circuit grounded its decision on *Graham* v. *Connor*, 490 U.S. 386 (1989). The court held that the *Graham* standard of liability already takes into account "the dynamic arrest situation," Pet. App. 73a, and that "[t]he incorporation of this consideration into the basic fabric of the law in this area strongly suggests that provocation by

the victim in a situation where an officer must act instantly is typical — not unusual," *id.* But there is no basis in the Guidelines to presume that the Commission intended for the *Graham* standard to preclude the district court's consideration of provocative victim misconduct in determining whether an excessive force case is sufficiently unusual to warrant departure. Indeed, as noted above, the Commission stated that it did "*not* intend to limit the kinds of factors, whether or not mentioned anywhere in the guidelines, that could constitute grounds for departure in an unusual case," U.S.S.G. Ch. I, Pt. A, intro. comment. (4)(b) (emphasis added). Thus, rather than excluding that factor, the Guidelines in fact establish a general presumption that the victim's conduct, as well as any other type of mitigating factor not expressly prohibited as a basis for departure, may be considered in determining whether any such case is unusual. Victim provocation may not invariably warrant a departure, but the district judge in this case explained that the facts here were highly unusual.

As the dissenting judges below concluded, "the panel's treatment of the five-point departure . . . [was] dictated less by the language or spirit of the Guidelines than by hostility to Judge Davies' decision to depart." Pet. App. 88a. The central issues addressed by the district court under § 5K2.10, p.s. — whether Mr. King engaged in "wrongful conduct" and whether his conduct "contributed significantly to provoking the offense behavior" — are ultimately questions involving "the district court's application of the guidelines to the facts." The district court's resolution of these issues is therefore entitled to "due deference" as required by 18 U.S.C. § 3742(e), and cannot be disturbed absent an abuse of discretion.

2. The District Court Did Not Abuse Its Discretion In Making The 5-Level Downward Departure

The district court's determination that Mr. King engaged in conduct that contributed materially in bringing about the transition across the "thin line" between the legal use of force in overcoming dangerous resistance to an arrest and the unlawful application of force is supported by numerous factual findings affirmed by the court of appeals. Mr. King "consumed more than 80 ounces" of alcohol, Pet. App. 97a, and "was admittedly intoxicated" while driving, *id.* 121a. "He exceeded the speed limit at times," *id.*, driving "in excess of 100 m.p.h.," *id.* 97a. He "failed to stop his vehicle, even after he belatedly perceived the flashing police lights and sirens." *Id.* 121a. After exiting the freeway, Mr. King eluded three police vehicles in an eight-mile chase. *Id.* 98a. He resisted initial police orders to step out of his car. *Id.* 121a-122a. He refused to lie prone as ordered. *Id.* 122a. He "resisted and became combative," throwing off four police officers and "forcing . . . [them] to retreat." *Id.* 98a. He "attempted to escape from police custody," *id.* 122a, "charg[ing] towards Officer Powell," *id.* 101a, and shrugged off the electrical charge of two taser darts. Mr. King was sweating profusely, appeared to be under the influence of PCP, did not permit himself to be searched for deadly weapons and was reasonably perceived as dangerous. Even the Government concluded that in this context, "much of the officers' conduct was justified and legal." *Id.* 99a.

The district court's conclusion that Mr. King's wrongful conduct "contributed significantly to provoking the offense behavior," *id.* 121a, is additionally supported by numerous factual findings affirmed by the court of appeals. "Had Mr. King pulled over, and not caused the CHP officers to pursue him for up to eight miles," Sergeant Koon and the other LAPD officers "would not have been summoned."

Id. 122a. Sergeant Koon "did not seek out a victim"; rather he was present only as "a consequence of Mr. King's wrongful conduct." *Id.* Once at the scene, Mr. King further provoked the offense by refusing to obey police officers' orders, throwing off four police officers, attempting to escape, and charging Officer Powell. *See id.* 121a-122a. Had Mr. King not engaged in such dangerous and threatening conduct, "all in a matter of seconds, during the course of a dynamic arrest situation," *id.* 123a, when "police officers are . . . forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving," *Graham*, 490 U.S. at 396-97, the 19-second incident that produced Sergeant Koon's conviction would have never occurred in the first place. *Id.* 123a.[15]

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[15] The district court's determination to depart based on victim misconduct is further supported by consideration of relevant factors listed under § 5K2.10, p.s. *See* U.S.S.G. § 5K2.10, p.s.; Pet. App. 122a-123a & n.13. With respect to the size, strength and other relevant physical characteristics of Mr. King vis-à-vis the defendants, *see* U.S.S.G. § 5K2.10(a), p.s., the district court found that "[a]t 6'3" and approximately 225 lbs., Mr. King was appreciably larger than both Koon and Powell." Pet. App. 122a. As for the persistence of Mr. King's wrongful conduct, *see* U.S.S.G. § 5K2.10(b), p.s., the district court found that he "resisted and evaded arrest" despite being pursued "for up to eight miles" and that Mr. King "persistently failed to comply with police commands." Pet. App. 122a. Addressing efforts made by Sergeant Koon to prevent confrontation, *see* U.S.S.G. § 5K2.10(b), p.s., the district court found that Sergeant Koon specifically "ordered Officer Melanie Singer to holster her service revolver." Pet. App. 98a. With respect to the danger reasonably perceived by Sergeant Koon, *see* U.S.S.G. § 5K2.10(c), p.s., the district court concluded that Sergeant Koon's "early perception of Mr. King as dangerous was reasonable," Pet. App. 122a, that "a reasonable officer at the scene may have judged that Mr. King was reaching for a weapon" at one point during the arrest, *id.* 104a, and that "[a]t least during the initial stages of the arrest process, Sergeant Koon may reasonably have suspected that Mr. King was under the influence of PCP because of Mr. King's erratic and recalcitrant behavior," *id.* 101a. And as for the danger actually presented to Sergeant Koon by Mr. King, *see* U.S.S.G. § 5K2.10(d), p.s., the district court noted that Mr. King was an "unsearched felony suspect," Pet. App. 122a, had thrown off four police officers trying to subdue him, and had charged a police officer while attempting to escape from custody, *id.*

The Ninth Circuit accepted the district court's determination that Mr. King engaged in extremely dangerous conduct that went well beyond the initial occasion for his arrest, but rejected the departure on the basis of its own judgment as to whether the conduct sufficiently provoked "the offense behavior." *See* Pet. App. 70a-71a. That issue, however, is precisely the type of fact-intensive determination that Congress intended for district courts to retain wide discretion to make in departure cases. Regardless how an appellate court might decide the matter on a de novo basis, the district court's factual findings provided a sufficient basis for its conclusion that a departure based on § 5K2.10, p.s. was warranted in this case. The trier of fact's decision clearly was not an abuse of discretion.

B. The District Court Acted Within Its Discretion When It Made A 3-Level Departure Based Upon A Combination Of Various Factors Not Prohibited By The Guidelines

1. The 3-Level Departure Based Upon A Combination Of Factors That Make The Case Unusual Is Subject Only To Abuse-Of-Discretion Review

The district court also granted a 3-level departure based upon a combination of three factors that, when considered together, gave "rise to 'mitigating circumstances' that warrant a departure from the Guidelines range." Pet. App. 130a. The court below independently scrutinized each of the multiple factors relied upon by the district court, to determine whether, in its view, each was "'appropriate' to support a departure." *Id.* 83a (dissent from denial of rehearing *en banc*). But the "panel failed to make the proper inquiry: whether the factor was *prohibited* by the Guidelines. Instead, it created its own category of *inappropriate* factors, namely those which are not prohibited but which in the panel's opinion do not warrant a departure." *Id.* 83a-84a (emphasis in original).

This approach is plainly improper. The district court's reliance on a combination of factors to justify its 3-level departure does not even arguably present pure legal questions suitable for de novo review. The lengthy analysis of these factors by the court of appeals does not hinge on a legal interpretation of "a set of words" in the Guidelines, *Rivera*, 994 F.2d at 951, but rather is an expression of the court's general views on the "structure and policies of the Guidelines and the federal sentencing statutes." Pet. App. 59a. To the extent that sort of analysis is permissible at all under the Sentencing Reform Act, it is for the Commission, not the courts of appeals, to make. The simple fact is that the Commission has said it does *not* intend to preclude

district courts from considering *any* factors as grounds for departure, unless such factors are expressly identified in the Guidelines. The district court's reliance here on several non-prohibited factors to depart was a pure exercise of discretion reserved to it by the Guidelines and the statute, and its departure on that basis cannot be overturned unless the court abused that discretion.

2. The District Court Did Not Abuse Its Discretion In Making The 3-Level Downward Departure

Each of the factors underlying the 3-level departure has a substantial factual basis in this case and supports the district court's finding that this case falls outside the heartland of cases to which § 2H1.4 applies. The court of appeals' reversal of this departure simply is an improper attempt to second-guess the district court's evaluation of the unusualness of the facts of this case.

There can be no doubt that the circumstances surrounding Sergeant Koon's successive prosecutions are "unique." Sergeant Koon was tried twice for essentially the same offense in an environment that carried with it the threat of rioting on an unprecedented scale if he were not convicted at the second trial. The district court was fully aware that the pressures to convict Sergeant Koon were overwhelming.

The court of appeals rejected the district court's reliance on the issues of fairness presented by the successive prosecutions not on the basis of any explicit Guidelines provision prohibiting consideration of this factor. Rather, the Ninth Circuit opined that the successive prosecutions consideration "speaks neither to the culpability of the defendant, the severity of the offense, nor some other legitimate sentencing concern." Pet. App. 69a. Yet, surely a district court could reasonably conclude that the

defendant's prior *acquittal*, and his second trial, and the extraordinary pressures that accompanied each prosecution — for the same underlying conduct — is a valid consideration in determining the defendant's culpability and the severity of the offense.

Moreover, regardless of the constitutional implications of the two prosecutions, the court could consider the burdens imposed by the successive prosecutions for the same conduct as factors in determining how much additional punishment to impose. Well before the founding of this Nation, English common law barred an English prosecution if the defendant had already been tried and acquitted by a foreign government, *see, e.g., Roche's Case* (1775), 1 Leach C.L. 34 (4th ed. 1815); *Beak* v. *Thyrwhit*, 87 Eng. Rep. 124; 4 WILLIAM BLACKSTONE, COMMENTARIES *335; J.A.C. Grant, *Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons*, 4 UCLA L. REV. 1 (1956), and the laws of many states, including California, prohibit state prosecution of an act already prosecuted by another sovereign, *see, e.g.*, CAL. CONST., art. I, § 15; CAL. PENAL CODE §§ 656, 793-94 (West 1988); *People* v. *Comingore*, 570 P.2d 723 (Cal. 1977). The district court was well within its discretion to recognize the principles that underlie such a doctrine in calibrating the appropriate magnitude of the penalty here. Neither the Sentencing Reform Act nor the Guidelines precluded that analysis, and the Ninth Circuit should not have substituted its judgment in that regard for that of Congress and the Sentencing Commission.

Similarly, the district court did not abuse its discretion when it considered the highly unusual circumstances relating to the potential for additional punishment of Sergeant Koon beyond that inflicted by the sentence itself.

The saturation of publicity surrounding Sergeant Koon's prosecution, coupled with his status as a police officer, ensured that Sergeant Koon would be subject to additional danger in prison to a degree not experienced by the typical defendant. Although the Guidelines to a certain extent take into account a prisoners' vulnerability to physical assault, *see United States* v. *Lara*, 905 F.2d 599, 603 (2d Cir. 1990); Pet. App. 125a, the district court was not prohibited by the Guidelines from evaluating this factor to the extent that it was present in this case to a degree not contemplated by the Commission. *See* 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0, p.s. Moreover, the high-profile of Sergeant Koon's case in the media also ensured that Sergeant Koon would be subject to the fullest extent of punishment under LAPD disciplinary proceedings. This Court has recently confirmed that "district courts under the Guidelines retain enough flexibility in appropriate cases" to depart downward based on punishment imposed for the same underlying conduct in another case and that the defendant in such a case is "free to put his argument concerning the unusual facts of this case to the sentencing judge as a basis for discretionary downward departure." *Witte* v. *United States*, 115 S. Ct. 2199, 2209 (1995).

Finally, the district court properly took into account the absence of need to protect the public from further criminal activity by Sergeant Koon. The court found, and the government did not dispute, "that neither Koon nor Powell are violent, dangerous, or likely to engage in future criminal activity." Pet. App. 129a. Such considerations of deterrence were certainly properly taken into account by the district court. Indeed, 18 U.S.C. § 3553(a)(2)(C) mandates review of that factor: "[t]he court, in determining the particular sentence to be imposed, *shall consider* the need for the sentence imposed to protect the public from further crimes of the defendant." (emphasis added).

Irrespective of whether any of the factors relied upon by the district court for the 3-level departure could, standing alone, justify the three-level departure, these factors, when viewed *in combination*, provide a reasonable basis for the district court's departure. As the Ninth Circuit itself has observed:

> In making a decision in any particular case, good judgment will often require the evaluation of a complex of factors. No single factor may be enough to point to the wise course of decision. But a wise person will not look on each particular factor abstractly and alone. Rather, it will be how the particular pieces fit together, converge, and influence each other that will lead to the correct decision.

United States v. *Cook*, 938 F.2d 149, 153 (9th Cir. 1991). Accordingly, courts have recognized that a "unique combination of factors" may render a case atypical and thus warrant a district court's decision to depart, even though none of those factors, considered alone, would justify a departure. *See, e.g., id.*; *United States* v. *Anders*, 956 F.2d 907, 911 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1592 (1993); *United States* v. *Sklar*, 920 F.2d 107, 117 (1st Cir. 1990).

CONCLUSION

The district court acted within the discretion traditionally accorded sentencing judges, and not withdrawn from them by the Sentencing Reform Act or the Sentencing Guidelines. The court of appeals erroneously overrode that entirely proper exercise of discretion. If the Ninth Circuit's approach is upheld, decisions that should ultimately be

made by the Sentencing Commission will be made by appellate courts, and ultimately this Court, contrary to the clear intent of Congress.

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STATUTORY APPENDIX

STATUTES AND SENTENCING GUIDELINES

18 U.S.C. § 242 (1988)
(Deprivation of rights under color of law)

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

28 U.S.C. § 991 (1988)
(United States Sentencing Commission; establishment and purposes)

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman. At least three of the members shall be Federal

judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party. The Attorney General, or his designee, shall be an ex officio, nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.

(b) The purposes of the United States Sentencing Commission are to—

(1) establish sentencing policies and practices for the Federal criminal justice system that—

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and

(2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set

forth in section 3553(a)(2) of title 18, United States Code.

18 U.S.C. § 3553 (1988)
(Imposition of a sentence)

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C.

994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) APPLICATION OF GUIDELINES IN IMPOSING A SENTENCE.—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) STATEMENT OF REASONS FOR IMPOSING A SENTENCE.—The court, at the time of sentencing, shall state

in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) PRESENTENCE PROCEDURE FOR AN ORDER OF NOTICE.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any

additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) LIMITED AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

18 U.S.C. § 3742 (Supp. II 1990)
(Review of a sentence)

(a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—The Government, may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) PLEA AGREEMENTS.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the

sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) RECORD ON REVIEW.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) CONSIDERATION.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside of the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district

court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) DECISION AND DISPOSITION.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) APPLICATION TO A SENTENCE BY A MAGISTRATE.—An appeal of an otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(h) GUIDELINE NOT EXPRESSED AS A RANGE.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

U.S.S.G. CHAPTER ONE - INTRODUCTION AND GENERAL APPLICATION PRINCIPLES
(Nov. 1992)

Part A - Introduction

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2. <u>The Statutory Mission</u>

* * * * *

Pursuant to the Act, the sentencing court must select a sentence from within the guideline range. If, however, a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the prescribed range. In that case, the court must specify reasons for departure. 18 U.S.C. § 3553(b). If the court sentences within the guideline range, an appellate court may review the sentence to determine whether the guidelines were correctly applied. If the court departs from the guideline range, an appellate court may review the reasonableness of the departure. 18 U.S.C. § 3742. . . . .

* * * * *

The initial sentencing guidelines and policy statements were developed after extensive hearings, deliberation, and consideration of substantial public comment. The Commission emphasizes, however, that it views the guideline-writing process as evolutionary. It expects, and the governing statute anticipates, that continuing research, experience, and analysis will result in modifications and revisions to the guidelines through submission of amendments to Congress. To this end, the Commission is established as a permanent agency to monitor sentencing practices in the federal courts.

3. <u>The Basic Approach</u> (Policy Statement)

* * * * *

In its initial set of guidelines, the Commission sought to solve both the practical and philosophical problems of developing a coherent sentencing system by taking an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice. It analyzed

data drawn from 10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, the United States Parole Commission's guidelines and statistics, and data from other relevant sources in order to determine which distinctions were important in pre-guidelines practice. After consideration, the Commission accepted, modified, or rationalized these distinctions.

This empirical approach helped the Commission resolve its practical problem by defining a list of relevant distinctions that, although of considerable length, was short enough to create a manageable set of guidelines. Existing categories are relatively broad and omit distinctions that some may believe important, yet they include most of the major distinctions that statutes and data suggest made a significant difference in sentencing decisions. Relevant distinctions not reflected in the guidelines probably will occur rarely and sentencing courts may take such unusual cases into account by departing from the guidelines.

* * * * *

4. The Guidelines' Resolution of Major Issues (Policy Statement)

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(b) Departures.

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a

"heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5HI.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), § 5HI.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of § 5H1.4 (Physical Condition, Including Drug Dependence and Alcohol Abuse), and the last sentence of § 5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant

difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (e.g., physical injury) may infrequently occur in connection with a particular crime (e.g., fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover--unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. For example, the Commentary to § 2GI.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved. The Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not

mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

* * * * *

5. A Concluding Note

The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the United States Code. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied upon pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.

The Commission recognizes that some will criticize this approach as overly cautious, as representing too little a departure from pre-guidelines sentencing practice. Yet, it will cure wide disparity. The Commission is a permanent body that can amend the guidelines each year. Although the data available to it, like all data, are imperfect, experience with the guidelines will lead to additional information and provide a firm empirical basis for consideration of revisions.

* * * * *

U.S.S.G. §2A2.2 (Nov. 1992)
Aggravated Assault

(a) Base Offense Level: **15**

(b) Specific Offense Characteristics

(1) If the assault involved more than minimal planning, increase by **2** levels.

(2) (A) If a firearm was discharged, increase by **5** levels; (B) if a dangerous weapon (including a firearm) was otherwise used, increase by **4** levels; (C) if a dangerous weapon (including a firearm) was brandished or its use was threatened, increase by **3** levels.

(3) If the victim sustained bodily injury increase the offense level according to the seriousness of the injury:

Degree of Bodily Injury	Increase in Level
(A) Bodily Injury	add **2**
(B) Serious Bodily Injury	add **4**
(C) Permanent or Life-Threatening Bodily Injury	add **6**

(D) If the degree of injury is between that specified in subdivisions (A) and (B), add **3** levels; or

(E) If the degree of injury in between that specified in subdivisions (B) and (C), add **5** levels.

Provided, however, that the cumulative adjustments from (2) and (3) shall not exceed **9** levels.

(4) If the assault was motivated by a payment or offer of money or other thing of value, increase by **2** levels.

Commentary

Statutory Provisions: 18 U.S.C. §§ 111, 112, 113(b), (c), (f), 114, 115(a), (b)(1), 351(e), 1751(e). For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. *"Aggravated assault" means a felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (i.e., not merely to frighten), or (b) serious bodily injury, or (c) an intent to commit another felony.*

2. *Definitions of "more than minimal planning," firearm," "dangerous weapon," "brandished," "otherwise used," "bodily injury," "serious bodily injury," and "permanent or life-threatening bodily injury," are found in the Commentary to* §1B1.1 *(Application Instructions).*

3. *This guideline also covers attempted manslaughter and assault with intent to commit manslaughter. Assault with intent to commit murder is covered by §2A2.1. Assault with intent to commit rape is covered by §2A3.1.*

Background: This section applies to serious (aggravated) assaults. Such offenses occasionally may involve planning or be committed for hire. Consequently, the structure follows §2A2.1.

There are a number of federal provisions that address varying degrees of assault and battery. The punishments under these statutes differ considerably, even among provisions directed to substantially similar conduct. For

example, if the assault is upon certain federal officers "while engaged in or on account of ... official duties," the maximum term of imprisonment under 18 U.S.C. § 111 is three years. If a dangerous weapon is used in the assault on a federal officer, the maximum term of imprisonment is ten years. However, if the same weapon is used to assault a person not otherwise specifically protected, the maximum term of imprisonment under 18 U.S.C. § 113(c) is five years. If the assault results in serious bodily injury, the maximum term of imprisonment under 18 U.S.C. § 113(f) is ten years, unless the injury constitutes maiming by scalding, corrosive, or caustic substances under 18 U.S.C. § 114, in which case the maximum term of imprisonment is twenty years.

U.S.S.G. §2H1.4 (Nov. 1992)
Interference with Civil Rights Under Color of Law

(a) Base Offense Level (Apply the greater):

(1) **10**; or

(2) **6** plus the offense level applicable to any underlying offense.

Commentary

Statutory Provisions: 18 U.S.C. § 242.

Application Notes:

1. *"6 plus the offense level applicable to any underlying offense" means 6 levels above the offense level for any underlying criminal conduct. See the discussion in the Commentary to §2H1.1.*

2. *Do not apply the adjustment from §3B1.3 (Abuse of Position of Trust or Use of Special Skill).*

Background: This maximum term of imprisonment authorized by 18 U.S.C. § 242 is one year if no bodily injury results, ten years if bodily injury results, and life imprisonment if death results. A base offense level of 10 is prescribed at §2H1.4(a)(1) providing a guideline sentence near the one-year statutory maximum for cases not resulting in death or bodily injury because of the compelling public interest in deterring and adequately punishing those who violate civil rights under color of law. The Commission intends to recommend that this one-year statutory maximum penalty be increased. An alternative base offense level is provided at §2H1.4(a)(2). The 6-level increase under subsection (a)(2) reflects the 2-level increase that is applied to other offenses covered in this Part plus a 4-level increase for the commission of the offense under actual or purported legal authority. This 4-level increase is inherent in the base offense level of 10 under subsection (a)(1).

Enhancement under §3B1.3 (Abuse of Position of Trust or Use of Special Skill) is inappropriate because the base offense level in §2H1.4(a) reflects that the abuse of actual or purported legal authority is inherent in the offense.

U.S.S.G. §5K2.0 (Nov. 1992)
Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance.

The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guidelines range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

U.S.S.G. §5K2.10 (Nov. 1992)
Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;

(b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;

(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) the danger actually presented to the defendant by the victim; and

(e) any other relevant conduct by the victim that substantially contributed to the danger presented.

Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A.3 (Criminal Sexual Abuse). In addition, this provision usually would not be

relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.